IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9143 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MUMAN ALIJI NOORBHAI

Versus

STATE OF GUJARAT

Appearance:

MR JA ADESHRA for Petitioners

Mr IM Pandya AGP for Respondent No. 1

MR KS JHAVERI for Respondent No. 3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 27/09/2000

ORAL JUDGEMENT

Learned advocate Mr. Adeshara is appearing for the petitioner.Learned advocate Mr.KS Jhaveri is

appearing for the respondent no.3. Learned AGP Mr.Pandya is appearing for respondents nos. 1 and 2. In this petition, rule was issued by this court on 4.9.2000 and while issuing rule, notice as to interim relief was issued by this court and the matter was fixed today for hearing on interim relief. However, today, when the matter was taken up, parties have consented for taking the matter for final disposal today itself. Hence, with the consent of the learned advocates for the parties, the matter has been taken up for final hearing today.

Brief facts of the present petition are as under:

The petitioner had purchased agricultural land ad measuring 1 acre 4 gunthas out of survey no. 226/5 and the land admeasuring 1 acre 17 gunthas out of Survey No. 226/7 by a registered sale deed dated 18.4.1994 for Rs.75,750.00. That the land bearing survey No. 226/5 was never declared as a fragment but later on vide entry no. 1916 dated 12.1.1990, the said survey no. 226/7 was exempted and was declared to be not a fragment. That the said entry dated 12.1.1990 bearing No. 1916 has been certified. It is the case of the petitioners that the land in question was all throughout cultivated by borewell water supplied by one Adam Rahim who has also signed in the registered sale deed as a confirming party. It is the further case of the petitioners that the entry no. 2198 dated 18.4.1994 was made in the village form no. 6 by entering the names of the petitioners in the revenue record as owners of the land in question. It is the further case of the petitioners that the original owners have not initiated any proceedings against the said two persons who have purchased 29 gunthas of the land out of the very same survey no. 226/7 and despite the fact that the said sale deed was executed on the same day i.e. 18.4.1994. Thereafter, surprisingly, the land owner Suleman Nurabhai Manknojiya after completing the sale transaction and after pocketing Rs.75,750.00, filed an absolutely false application before the Deputy Collector Palanpur on 28.10.1994 alleging breach of the provisions of the Bombay Prevention of Fragmentation Act. That the Deputy Collector appreciated the entire merits of the case and vide order dated 19.9.1995, rejected the said application. Original owner Maman Suleman Nurabhai expiredon 29.6.95 during the pendency of the proceedings before the Dy. Collector, Palanpur. The legal heirs of the deceased Suleman Nurabhai namely Shri Gulambhai Sulemanbhai (respondent No.3 herein) filed revision application before the State Government purported to be under section 35 of the Bombay Prevention of Fragmentation Act,1947 which came to be allowed by the

Deputy Secretary (Appeals) Revenue Department, Gujarat State, Ahmedabad vide order dated 1.6.2000 and under the said order, the order of the Deputy COllector dated 19.9.2000 was set aside. Against the said order dated 1.6.2000 passed by the Deputy Secretary (appeals), the petitioners have preferred this petition before this Court.

Learned advocate Mr.Adeshara has submitted that the respondent NO.3 has no locus standi to file such an application before the Deputy Collector, Palanpur for breach of section 9 of the said Act and, therefore, the original owner, after pocketing the amount of consideration, has no locus standi to challenge the said sale deed before any authority. However, he has submitted that the Deputy COllector has considered all the aspects and has given detailed reasons while rejecting the application of the original land owner. He has also submitted that the revisional authority has wrongly appreciated the evidence on record and has come to the conclusion which is contrary to record and, therefore, the order passed by the Deputy Secretary is required to be quashed and set aside.

On the other hand, learned advocate Mr. Jhaveri appearing for respondent No.3 has supported the order passed by the revisional authority by submitting that the said transaction was in violation of section 9 of the provisions of the Bombay Prevention of the Fragmentation Act, 1947 and as such, the revisional authority was justified in setting aside the order passed by the Deputy Collector while allowing the revision application of the respondent NO.3. He has further submitted that the revisional authority has passed the said order after appreciating the facts and circumstances of the case and,therefore,this Court should not interfere with the same while exercising the powers under Article 226/227 of the Constitution of India.

Learned AGP Mr.Pandya appearing for the respondent authority has also submitted that the revisional authority has rightly appreciated the facts on record and the order passed by the revisional authority is quite legal and valid order and therefore this court should not interfere with such order in exercise of the powers under Article 226/227 of the Constitution of India.

I have considered the arguments advanced by the learned advocates for the respective parties. I have also perused the order passed by the Deputy Collector as

well as the Deputy Secretary (Appeals) in revision application preferred by the heirs and legal representatives of the original land owner. In his order dated 19,.5.1995, the Deputy Collector,Palanpur has observed that the land bearing survey No. 226/5 and 226/7 both paiki s.n.226/7 has been entered as fragment and by entry no.1916, said fragments were deleted in the revenue record. He has further observed that the land s.n.226/1 has not been recorded as fragment. He has also observed that in the agreement to sale, it is specifically mentioned that the land s.n. 226/1 has been irrigated by borewell water and, therefore, it does not appear that there is violation of the provisions of the said Fragmentation Act. It has also been observed by the Dy. Collector that the notices under section 6(2) have not been served upon the petitioner and there is no any endorsement on record and after selling the land in question, remaining land is more than 20 Gunthas and, therefore, new fragment has not arisen. The provisions of the circular of the Government has also been appreciated by the Deputy Collector and after appreciating the same, has come to the conclusion that the said provisions are not applicable on the ground that thes.n.226/5 was not registered as fragment. In view of such conclusion, the Deputy Collector has rejected the application submitted by the original land owner. In comparision to the reasoning given by the Deputy Collector, I have also perused the order passed by the revisional authority. The revisional authority has come to the conclusion that the land s.n. 226/7 ad measuring 2 Acre 15 Guntha is not recorded as a fragment but in the very same survey number, land ad measuring 2 acre 6 Gunthas has been recorded as a fragment but by entry no. 1916, it has been exempted from fragment. The revisional authority has also observed that the lands of both the said survey numbers were running in the name of Muman Suleman Nurabhai and he has sold the land admeasuring A.1.04 G. forming part and parcel of survey No. 226/5 and the land s.n.226/7 paiki A.1.17 Guntha to the petitioners by registered sale deed and in view of that, as per the conclusion of the revisional authority, the land in question has been divided into two parts and, therefore, the revisional authority has concluded that the provisions of sec.9 have been violated by the petitioner.

I have considered the arguments advanced by the learned advocates for the parties. I have also perused the orders passed by the revenue authorities. As per my view, the observations made by the revisional authority namely Deputy Secretary (Appeals) are totally contrary to

the evidence on record. Upon perusal of the order passed by the Deputy Collector in comparison to the order passed by the revisional authority, I am of the opinion that the order passed by the Deputy Collector is based on evidence and is in consonance with the record whereas the order of the Deputy Secretary (Appeals) in revision is based on presumption and is not based on record. The revisional authority has not considered as to how the order passed by the Deputy Collector is incorrect or contrary to law. If the revisional authority would have appreciated the facts which were recorded on the basis of the evidence on record by the Dy. Collector in his observation that the entry no. 1916 wherein fragment in respect of s.n.226/7 has been deleted and in respect of s.n.226/1 which is not recorded as a fragment and considering the averments made in the agreement in respect of s.n.226/1 wherein it has been observed that the land has been cultivated by borewell, then, the Deputy Secretary would not have come to such conclusions. Therefore, according to my opinion, the order passed by the revisional authority is based on mere presumption and is not sustainable. I am of the view that the order passed by the Dy. Secretary is contrary to the evidence on record and as such, it is erroneous.

Learned advocate Mr. Adeshara has relied upon the decision in case of Jiviben Wd/o. Kalaji Bapuji versus State of Gujarat and others reported in 1998(3) GLR 2567 wherein this court has observed that there is one important aspect which is required to be referred to. As per the orders passed in 1951, a non irrigated land less than 2 acres in area would be a fragment but so far as the irrigated land is concerned, it would be a fragment only if it has an area of less than 20 Gunthas. In the said decision, the land in question was ad measuring 1 acre and two gunthas admittedly being irrigated since the year 1989-90. It was observed that of course, there is some controversy about the date from the land came to be irrigated Even if one were to proceed on the footing that the land came to be irrigated only from 1989-90, the fact remains that the land is since last about nine years an irrigated land and, therefore, even according to the petitioner, sale of such land after 1989-90 would not have been void. In the said decision, in view of such facts, it was observed that this is an additional ground for not interfering with the order of the tribunal in exercise of its discretionary jurisdiction under Article 226 or 227 of the Constitution when the object underlying the Act is not being frustrated.

Considering the observations made in the said decision, in the instant case, remaining land which is irrigated land is more than 20 gunthas and, therefore, same cannot be considered as fragment and it has been so held rightly by the Deputy Collector. This important aspect has totally been ignored by the revisional authority while passing the impugned order and as such, the order passed by the revisional authority is not in consonance with the law laid down by this court in case of Jiviben (supra) and as such, same is required to be quashed and set aside while restoring the order passed by the Deputy Collector. Considering these facts and circumstances of the case, the petition is required to be allowed.

Accordingly, this petition is allowed. The impugned order dated 1.6.2000 passed by the Deputy Secretary (appeals) (Annexure "E") is quashed and set aside. The order dated 19.9.1995 passed by the Deputy Collector, Palanpur (Annexure "D") is restored. Rule is made absolute accordingly. There shall be no order as to costs.

27.9.2000. (H.K. Rathod,J.)
Vyas